In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-613

MRS. DELTA MELANCON, PETITIONER

v.

RMK-BRJ, A JOINT VENTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. This action was instituted in the district court by petitioner under the Jones Act, 46 U.S.C. 541 *et seq.*, and the Death on the High Seas Act, 46 U.S.C. 761 *et seq.*, to recover damages for the wrongful death of her husband, who was drowned in South Vietnam when bombs placed by the Viet Cong exploded, sinking the dredge on which he was employed by respondent, a contractor of the United States.

The district court granted respondent's motion for summary judgment (Pet. App. 1a–15a) on the ground that petitioner's exclusive remedy lay under the War Risk Hazards Compensation Act, 42 U.S.C. 1701 *et*

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seq.[1] That Act authorizes compensation payments for a war-risk death or injury to a government-contractor's employee, and makes the provisions of the Federal Employees' Compensation Act, 5 U.S.C. 8101–8150, applicable to such death or injury "in the same manner and to the same extent as if the person so employed were a civil employee of the United States and were injured while in the performance of his duty * * *." 42 U.S.C. 1701(a).[2] The court of appeals affirmed *per curiam* (Pet. App. 17a) and denied a petition for rehearing (Pet. App. 19c–20a).

2. In cases arising under the Federal Employees' Compensation Act, this Court and the courts of appeals have uniformly held that federal civil service seamen who have a compensation remedy are precluded from bringing a tort action against their employer—whether based upon negligence or unseaworthiness. *Johansen* v. *United States*, 343 U.S. 427; *Patterson* v. *United States*, 359 U.S. 495; *Johnson* v. *United States*, 402 F. 2d 778 (C.A. 5), certiorari denied, 394 U.S. 930; *Aho* v. *United States*, 374 F. 2d

[1] The suit had previously been stayed by the district court pending a determination by the Bureau of Employees' Compensation of the Department of Labor as to whether petitioner had a compensation remedy under the Defense Base Act, 42 U.S.C. 1651–1654, or the War Risk Hazards Act, 42 U.S.C. 1701–1717 (Pet. App. 3a). On December 4, 1969, the Director of the Bureau entered a compensation order awarding petitioner death benefits under the War Risk Hazards Compensation Act.

[2] The scale of compensation benefits to be paid under the War Risk Hazards Compensation Act is that contained in the Longshoremen's and Harbor Workers' Compensation Act, 42 U.S.C. 1702.

885 (C.A. 5), certiorari denied, 389 U.S. 930; *Suhar* v. *United States*, 351 F. 2d 952 C.A. 5); *Jarvis* v. *United States*, 342 F. 2d 799 (C.A. 5), affirming *Petition of the United States*, 212 F. Supp. 214 (E.D. La.), certiorari denied, 382 U.S. 831; *Mills* v. *Panama Canal Co.*, 272 F. 2d 37 (C.A. 2), certiorari denied, 362 U.S. 961. The same result necessarily follows in this case where the Federal Employees' Compensation Act, including its specific exclusivity provision (5 U.S.C. 8116(c)), is made applicable by statute to those entitled to a War Risk Hazards Compensation Act remedy.[3]

Petitioner notes (Pet. 7, 8) that Section 102(a) of the War Risk Hazards Compensation Act, 42 U.S.C. 1702(a), includes a reference to the Longshoremen's and Harbor Workers' Compensation Act, which in turn excludes from coverage the masters or members of the crew of a vessel. What she overlooks, however, is that 42 U.S.C. 1702(a) limits the application of the Longshoremen's Act to the War Risk Hazards Compensation Act by applying the former only to determine "the scale of compensation benefits and the provisions for determining the amount of compensation and the payment thereof * * * *". By contrast, the provisions of the Federal Employees' Compensation Act were

[3] Petitioner's reliance (Pet. 5–7) upon *Reed* v. *The Yaka*, 373 U.S. 410, and *Jackson* v. *Lykes Bros. SS. Co.*, 386 U.S. 731, is misplaced. As recognized in *Aho* v. *United States*, 374 F. 2d 885 (C.A. 5), certiorari denied, 389 U.S. 930, these decisions do not affect the application of the exclusivity provision of the Federal Employees' Compensation Act.

intended to apply to entitlement to benefits "in the same manner and to the same extent" (42 U.S.C. 1701(a)) as they apply to civil employees of the United States.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1971.

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